

to *them* (not only ignoring the popular will, but opening the doors to many years of fascist oppression), not for only the self-regarding, egotistic reason that the United States must vindicate the intimations of its own tradition.

A communitarian may reply: Why can't we identify the relevant community as the *international* community, and say that since that community has agreed to an international law of human rights, international human rights are now part of the "intimations of the tradition"? This position amounts to unconditional surrender, since it makes communitarian realism trivially true. If human rights are universal, then communitarianism is tantamount to liberalism. The communitarian can no longer identify a relevant community as legitimately denying human rights, because members of that community would also be part of the international community, and as part of that community they are governed by the imperative to honor human rights.

Normative realism, then, is not a *sufficient* justification for international acts. Moreover, the pursuit of national interest (in either the utilitarian or communitarian versions) is not a *necessary* condition of justified international acts. *If* we conclude that people have some transboundary duties to assist people in distress, or some duties to transfer wealth derived from appropriate principles of distributive justice (a point I will not attempt to demonstrate here), international morality may mandate or permit such acts by a government even if they do not advance the national interest of the citizens it represents.

To conclude: Normative realism is unappealing in any of its versions because of its indifference to universal principles of justice—in particular, human rights. Utilitarian realists are right in seeking a liberal democratic foundation of national interest, but a human rights side-constraint is needed. Communitarian realists, on the other hand, are right in seeking a foundational approach and thus rejecting the utilitarian determination of the national interest: they are wrong, however, in the foundational principle they propose. This principle, like the utilitarian one, is also insensitive to human rights; unlike its utilitarian counterpart, communitarian realism neglects actual interests vindicated by democratic theory (unless the tradition happens, by historical accident, to be the right one on independent moral grounds).

Only a theory of international morality firmly grounded on human rights can avoid the pitfalls of realism. By extension, human rights (and not the rights of states) provide the ethical foundation of international law. *An international act is in principle immoral when it violates human rights.* Lack of time prevents me from developing this thesis here.

Two final remarks. First, the human rights theory of international law and relations counts the support of one of the fathers of rationalism and modern liberalism: Immanuel Kant. And finally, the current global democratic revolution cries for a shift of paradigm. Human rights, not rights of states, must be at the basis of any defensible moral theory of international law and relations.

THE VIEW FROM THE NEW HAVEN SCHOOL OF INTERNATIONAL LAW

*By W. Michael Reisman**

Consider, for a moment, the sorts of professional problems encountered by the contemporary international lawyer:

*Yale Law School.

- As a member of the International Law Commission, you are charged with adapting the inherited principles of state responsibility to the political and technological environment of the twenty-first century and, as part of this task, with establishing rules for liability without fault.
- As a lawyer in the United Nations legal division, you have been asked to prepare the Secretary-General's Report on "strengthening and making more efficient within the framework and provisions of the Charter the capacity of the United Nations for preventive diplomacy, for peace-making and for peace-keeping."¹
- As General Counsel of the National Security Council or Legal Adviser of the Department of State, you have been asked to advise the President of the United States as to whether to intercept and board, on the high seas, vessels believed to be carrying nuclear components to a Middle Eastern state.
- As a professor of international law, you want to appraise the quality of work of those who perform the tasks in the preceding examples.

The way you characterize these problems, the intellectual tools you use to research them and the information you think relevant for answering them will all be determined by your conception of law. Your conception will influence the role you assume, the method you use, the ethics you adopt and the outcome.

Like the proverbial elephant, the complex of social processes and organizations that are generally referred to as "the law" may be viewed from many different perspectives. People trained and sometimes locked into one perspective can scarcely believe there may be others, even less that they are equally authentic and that, for some or all tasks, they may be even more useful than the one with which they were indoctrinated and, as a result, with which they are comfortable. Each perspective is the basis for a legal jurisprudence.

Positivism views law from the perspective of the receiver of commands, the "political inferior."² From this perspective, law is a body of commands. This perspective assumes the independent moral value of obedience. The essential technical problem is properly identifying the content and meaning of the command and the circumstances and procedures for obedience to it.

An entirely different perspective, deriving from the natural law tradition, is that of the person charged with making decisions. From the perspective of the decision maker, the technical and moral problems that are confronted are not framed in terms of obedience but rather in terms of making choices that are appropriate for the relevant community.

The body of rules that serves to provide the positivist with strict commands requiring obedience does not disappear, but from the perspective of the decision maker those rules are more complex communications, conveying authoritative information about community policies of varying weights that must be assessed, in each case, and then shaped into a decision. The technical and moral problems associated with obedience recede.

Selecting the right jurisprudence for a task is critical. The New Haven School of jurisprudence is an entirely secular theory of law but it takes the perspective long associated with natural law, that of the decision maker. For New Haven, the

¹ Such a report was, in fact, requested by the Security Council on January 31, 1992. The Secretary-General is to submit the report by July 1, 1992. S/23500, 31 January 1992, at 3-4.

² JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 1-3, 9-33 (1832). Law is a command from a political superior to a political inferior. For discussion of the relevance of this formula to the New Haven School, see W. MICHAEL REISMAN & AARON SCHREIBER, *JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW* 270 (1987).

notion of decision extends across the range of social organization and throughout the hierarchy of power; it includes the making of law or legislation as well as its application through courts or other institutions, and it conceives of both these activities as operating at the constitutive or structural level and in all of the various value processes of a community, including the production of wealth, of enlightenment, of skill, of health and well-being, of affection, of respect and rectitude.

For the positivist, a primary jurisprudential and intellectual task is the identification of what must be obeyed. Hence the recurring concern with finding the "sources" of law. From the standpoint of the New Haven School, jurisprudence is a theory about making social choices. The primary jurisprudential and intellectual tasks are the prescription and application of policy in ways that maintain community order and, simultaneously, achieve the best possible approximation of the community's social goals. The jurisprudential tools necessary for performing these tasks must address a wide range of issues, including: (1) the way one looks at oneself; (2) the way one looks at the social process one is trying to understand and influence; and (3) the way one tries to influence it.

Clarification of Standpoint

Let's return for a moment to the proverbial elephant—the question of perspective. For any phenomenon, there are many possible standpoints, each of which affects it and how it is viewed. Clarity with regard to observational standpoint is an indispensable intellectual tool. Both the reference and content of the term "law" will vary depending on whether the standpoint is that of a member of the elite or the rank-and-file, whether the observer is a member of the system observed, is an outsider or is on the margin. Perception of the same phenomenon may vary depending on the culture, class, gender, age, or crisis-experience of the observer. Even within the legal establishment, reference and content will vary depending on whether the observer is a legislator, a judge, a prosecutor, a juror, a defense attorney, an accused or a victim. No standpoint is more authentic than another, but the scholar must be sensitive to the variations in perception that attend each perspective and must try to disengage himself or herself, select one that is appropriate to the task and carefully determine and consistently maintain it.

In all observation, the individual self-system is the ultimate instrument of perception, appraisal and choice. Because it is necessary to calibrate all instruments, a second preliminary intellectual task the New Haven School poses is one of "self-calibration" by various techniques of self-scrutiny: the person performing a decision function is urged to examine the self for latent emotional problems or neurotic tendencies, subgroup parochialism and the distortions that may arise from professional conditioning.

Focal Lenses

The New Haven School is also concerned with the way the observer looks at things, whether State Responsibility, the ability of the United Nations to perform its security functions, or the way freedom of the oceans is accommodated with security needs.

We all look at our environment and specific issues within it "through" a variety of conceptual categories. In the physical sciences, different lenses and dyes permit the observer to bring different features or properties of the same viewed object into sharper focus or greater prominence. A comparable function may be performed in

the social sciences by carefully crafted conceptual categories that serve as “focal lenses.”

(1) New Haven believes that a useful theory about law must avoid the temptation, so common in conventional legal method, to drastically reduce the universe of variables to a text or a few purportedly key social factors. You cannot get far with any of the problems we started with if you limit yourself to a few texts. New Haven’s theory seeks to be as comprehensive as possible regarding the various factors that influence decision.

(2) In advanced, industrial and science-based civilizations, some major decisions are ongoing and incorporate, in the collection of information and the exploration of alternative possible arrangements, the efforts of many people. New Haven recognizes the demands of economy and tries to develop various techniques of selectivity, especially for rapid decision making.

(3) The notion of law as a body of rules, existing independently of decision makers and unchanged by their actions, is a necessary part of the intellectual and ideological equipment of the political inferior. It makes no sense in a jurisprudence which conceives of law as a process in which human beings try to influence the way social choices are made about the production and distribution of the things that they want, including considerations about the ways in which those decisions should be made. New Haven reserves the word “law” for processes of decision that are both consistent with the expectations of rightness held by members of a community (authoritative decisions) and effective (controlling decisions). While the particular mix of authority and control may vary widely, a conception of law as authoritative and controlling decision avoids exercises in irrelevance, whether because of absence of authority or absence of control.

(4) A commonly observed pathology of conventional legal research is its tendency to examine only words in documents. A jurisprudence concerned with understanding and influencing the way people behave must be able to study and account for what people do as well as what they say, think and feel. Deeds, as well as words, are indicators of subjectivity, so New Haven recommends a focus on both.

(5) In any group process, some decisions will be concerned with the way decisions henceforth will be taken in that setting. We reserve the term “constitutive process” to focus attention on that portion of a group’s activity concerned with establishing, maintaining or changing the fundamental institutions and procedures of decision making.

A Map of Community Processes

Focal lenses address the question of *how* observers look at pertinent data. We have yet to consider *what* observers look at. Conventional legal analyses and jurisprudences that conceive of law as a body of rules look only at a limited number of texts, characterized as legal, and those social events, “facts,” to which the rules direct attention. Because New Haven’s goal is understanding and influencing decision in ways that will precipitate desired social outcomes, the *what* of inquiry is necessarily broader than the *what* of conventional analysis.

The New Haven School has adapted, with a number of adjustments, a scheme of cultural anthropology, in which any social process is described systematically in terms of those who engage in it (the participants), the subjective dimensions that animate them (their perspectives), the situations in which they interact, the resources upon which they draw, the ways they manipulate those resources and

the aggregate outcomes of the process of interaction, which are conceived in terms of a comprehensive set of values.

The participants in any decision process include those formally endowed with decision competence, for example judges, and all those other actors who, though not endowed with formal competence, may nonetheless play important roles in influencing decisions. In international decision, the observer must examine, in addition to formal international organizations, state officials, nongovernmental organizations, pressure groups, interest groups, gangs, and individuals, who act on behalf of all other participants and on their own. I don't see how an assessment of the dangers to and assets of the international community could be realistic and useful to the Secretary-General in the second example, without this expansion of focus.

By the same token, the inventory will not be of much use if it does not take account of the ways these various actors see things. The perspectives of these actors include their specific patterns of identification and disidentification, their matter-of-fact expectations and the value demands they project. It is clear that in a complex arena such as international politics, the perspectives of the various participants actually playing a role in decision often diverge greatly in critical ways.

"Situations," as New Haven uses the term, refers generally to where decisions are made and to special properties of that "where." Conventional legal analysis generally looks to courts, secondarily examining the work of executive branches and legislatures. New Haven focuses on the range of centralized and decentralized settings in which decisions are made, their varying degree of organization and formality, the extent to which they are specialized and the extent to which they are continuous or episodic. We also examine the extent to which participants in a particular situation perceive themselves in a state of crisis—that is, a state in which critical values are deemed to be at stake.

The resources on which participants draw, their "bases of power," incorporate both effective power and symbols of authority. The New Haven School considers it appropriate for the jurist to correlate the extent, if any, to which control of power is available to support particular formulations.

In contrast to conventional legal analysis, which usually characterizes the outcome of a legal decision as a more specific statement of rule, New Haven seeks to conceive of outcomes, as do those affected by them, in terms of the confirmation and/or redistribution of the values at stake: of power, enlightenment, wealth, skill, well-being, affection, respect and rectitude.

Decision Functions

In most contemporary theories of jurisprudence, the term "decision" generally refers to a judge applying rules to a particular dispute in an organized setting. From the standpoint of a jurisprudence concerned with understanding and making choices, however, it is clear that the operation of making choices involves many more component functions. If one systematically separates out the elements of a decision, one can identify:

- (1) intelligence-gathering or the collection, processing, and dissemination of information relevant to social choices;
- (2) promotion or the processes by which consciousness of a discrepancy between a desirable state and one that is or is about to take place gradually leads to a demand for some type of community intervention and regulation;

- (3) prescription or lawmaking, which occurs when actors, with varying degrees of authority, select and install certain preferences about policy as community law. This may be accomplished by a legislature or some other organized law-maker; but it is usually, and, especially in international law, largely accomplished in informal and sometimes even chaotic processes whose outcomes are generally referred to as "custom."
- (4) invocation or the provisional characterization of a certain action as inconsistent with a prescription or law that has been established. Invocation is often accompanied by the demand that an appropriate community institution act;
- (5) application or the conventional conception of law: the organization of the facts of a dispute, the specification of a norm or norms that apply and the fashioning of a mandatory formulation. When this takes place in a court, it is called a judgment, but it also occurs in informal, unorganized situations;
- (6) termination or the abrogation of existing norms and the social arrangements based upon them, the development of transitional regimes and, where appropriate or necessary, the design of compensation programs for those who have made good-faith value investments expecting the old regime to continue;
- (7) appraisal, which is concerned with evaluating the aggregate performance of all decision functions in terms of community requirements.

A jurisprudential theory concerned only with obeying rules may content itself with a few of these decision functions. But a theory that wishes to understand fully the operation of law and to equip jurists to identify and influence decisions in all settings must use a more detailed concept of decision functions.

Intellectual Tasks of the Jurist

Until now, we have examined the way in which the New Haven School recommends that jurists prepare themselves for decision by clarification of observational standpoint and scrutiny of self, conscious selection of the focal lenses recommended for examining data pertinent to decision, deployment of the map of the manifold of social reality for the organization and interrelation of those data with reference to the specific decision operations through which community policy is clarified and implemented in order to influence the production and distribution of values or desired events. That production/distribution is the major concern of both politics and law in every community.

Many of these conceptual tools are used, in varying fashion, by scholars in other disciplines. Jurists are distinctive among them in that they alone undertake, explicitly, to intervene in the social process that has been examined in order to secure changes in its pattern of authoritative decision so that it will henceforth discriminate in favor of a particular party or, one hopes, in favor of the common interest. We have found it useful to develop procedures for this juridical task. The procedures relate to each of five intellectual tasks performed by all who participate in the operations or functions of decision.

(1) *Goal Clarification.* A conception of purposive behavior requires an idea of what end that behavior seeks to secure. New Haven recommends that all who perform decision functions examine the demands of particular actors in terms of their congruence with the common interest, expressed as preferred patterns of production and distribution of every value within a system of stable minimum order.

(2) *Trend Analysis.* Once a goal has been specified, it is necessary to examine the degree to which it has been achieved in past decision. This essentially historical function identifies and organizes trends in pertinent past decision in terms of the goal expressed.

(3) *Factor Analysis*. It is important to correlate past decisions with conditions that influenced them and to note whether that context of conditions has changed in a material and pertinent way.

(4) *Predictions*. What are commonly called predictions may be made by a variety of techniques, but there is no determined future. What will be is a function, in varying measure, of what actors elect to do now. Projecting different decision options and then examining the prospective aggregate value consequences of each in terms of the goals that have been clarified permits the jurist to select and, through time, to adjust particular recommendations so that they increase the probability of the eventuation of a preferred future and minimize the eventuation of a dystopian one.

(5) *Invention of Alternatives*. Each of the problems with which we commenced demands much more than a summary of the rules of the past. When, as is often the case, predictions suggest a likely discrepancy between a goal preference and a probable future, the New Haven School recommends that the jurist explicitly explore alternative arrangements to increase the probability of the eventuation of a desired future. This intellectual task is active and interventionist and engages the fundamental responsibility of the jurist and the citizen.

Conclusions

I suspect that much of the confusion and even passionate anger the New Haven School generates arises from failure to understand the perspective it adopts. Yet, one simply cannot design or amend a constitution or create new institutional arrangements in a complex community without deploying many of the conceptions and tasks that the New Haven School tries to elaborate. On the other hand, the conceptions and tools proposed by New Haven have little relevance for Austin's "political inferior." Indeed, for those who demand an ideology of strict compliance with authority, the perspective of the New Haven School seems threatening, destructive, even evil.

Bent Rosenthal³ made the interesting observation that New Haven's methodology seems better tooled for domestic than for international legal problems; I would have thought exactly the opposite. In circumstances in which the political and power environment is relatively unstable, the ecological environment is in a process of change, there is low or soft social consensus (if any) on many critical social goals and the aggregate consequences of different decision options on minimum political order are uncertain, the perspective and some equivalent of the methodology of the New Haven School will simply be necessary. These circumstances are recurring in international politics, and may be becoming less infrequent in domestic political systems as well.

Consider again the sorts of questions with which we commenced. While some of these questions might be "resolved" by finding an appropriate rule, most thoughtful people, I submit, would incline to view these as decisions that require a wider range of considerations and intellectual tasks, including clarification of what the community goals are or should be, what the aggregate consequences of the different options available to decision makers in terms of those goals would be, whether design of a particular response or a new institutional arrangement might be required and what constraints and possibilities are provided by the effec-

³BENT ROSENTHAL, *ETUDE DE L'OEUVRE DE MYRES SMITH MCDUGAL EN MATIÈRE DE DROIT INTERNATIONAL PUBLIC* (1970).

tive power environment. Much of modern international law is the product of individuals performing the decision functions I reviewed. Individuals created the human rights movement and the environmental movement. New Haven is concerned with clarifying a jurisprudence for these innovators and those who wish to join them.

That is, in brief, the view from New Haven.

SUBVERSIVE TRENDS IN THE JURISPRUDENCE OF INTERNATIONAL LAW

*By Hilary Charlesworth**

The excitement and turmoil of recent developments in domestic legal theory has taken some time to infiltrate discussions of the theory of international law. In the last few years, however, there have been some provocative and challenging attempts to rethink the basis of traditional international legal theories, drawing on postmodern analyses of national legal systems. I will focus on two manifestations of the postmodern mood: "critical" international legal studies and feminist analyses of international law.

Critical International Legal Studies

Since the late seventies, critical legal scholars have challenged a view of the law as rational, objective and principled by studying the indeterminacy of and contradictions inherent in legal rules.¹ The function of legal systems in legitimating the political, social and economic status quo have been examined and the notion of the "false necessity" or essential contingency of legal systems and legal truths developed in a wide variety of contexts. A unifying theme in much critical legal scholarship is the fundamental coincidence of law and politics and the futility of attempts to carve out a separate, distinct sphere for legal truth.

At first sight, public international law may seem a particularly hospitable terrain for these radical theories. International lawyers have long agonized about whether their discipline can rightfully claim the epithet "law." The sustained critique of the international legal order by developing nations has also contested the inevitability or necessity of particular international law principles by asserting their cultural bias and Western orientation. And yet most recent Western writing on international law appears to remain impervious to the critical challenge and continues to assume a basic dichotomy between law and politics, a distinctive sphere for international legal discourse, based either on natural law or positivist theories about the authority of international law.

Some exceptions to this general lack of critical curiosity among international lawyers have gathered (or been gathered) under the umbrella description of the "New Stream."² I propose to focus on the work of the Finnish jurist, Martti Koskenniemi, as the most recent and most accessible current in the critical stream.

The essence of Koskenniemi's attack is contained in the arresting title of his book, *From Apology to Utopia: The Structure of International Legal Argument*.

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¹The literature on critical legal studies (CLS) is vast. For an overview, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

²David Kennedy coined this term in *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1, 6 (1988). Nigel Purvis also uses it in a general descriptive sense in *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81, 88 (1991).